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Constitutional Law: Closing Public Schools to Avoid Racial Integration Not a Denial of Equal Protection

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seizures. But even if the decision is limited by precluding the use of university gathered evidence in a criminal prosecution,[53] the student remains subject to university disciplinary proceedings that could terminate his education and leave a deleterious record for his future.[54]

By holding that a university cannot consent to a police search, the instant decision clarifies a dormitory student's protection against unreasonable search and seizure. The student, however, still lacks full constitutional protection, since the university may conduct a warrantless search pursuant to its regulations requiring students to submit to such searches. Since the instant decision did not discuss the necessity of the warrant requirement and its effect on the university-student relationship, it remains for future decisions to determine what measure of protection the fourth amendment provides for the student against university searches. Until such questions are resolved, the dormitory student remains subject to administrative control above and beyond that of other citizens.

GEORGE W. ESTESS

CONSTITUTIONAL LAW: CLOSING PUBLIC POOLS TO AVOID RACIAL INTEGRATION NOT A DENIAL OF EQUAL PROTECTION

Palmer v. Thompson, 403 U.S. 217 (1971)

Petitioners, black citizens of Jackson, Mississippi, brought a class action to force the city to reopen its swimming pools and operate them on an integrated basis.[1] A federal district court denied the declarative and injunctive relief prayed for under the thirteenth and fourteenth amendments, and the Court of Appeals for the Fifth Circuit affirmed, six of thirteen judges dis-

53. This could be accomplished through an extension of Mapp v. Ohio, 367 U.S. 643 (1961).

54. *See* Jacobson, *The Expulsion of Students and Due Process of Law*, 34 J. HIGHER ED. 250 (1963); Sherry, *Governance of the University: Rules, Rights, and Responsibilities*, 54 CALIF. L. REV. 23 (1966); Note, *Admissibility of Illegally Obtained Evidence in Noncriminal Proceedings*, 22 U. FLA. L. REV. 38 (1969).

1. The city of Jackson, Mississippi, prior to 1962 operated all its public recreational facilities on a racially segregated basis. In that year certain of its black citizens brought an action against the city in the United States district court. They sought declaratory relief under the 13th and 14th amendments and an injunction to prevent the city from continuing to discriminate in the operation of its facilities. The district court held that the discrimination complained of did violate equal protection of the laws, but issued no injunction. The court preferred instead to rely upon the city officials' voluntary compliance with the judgment. Clark v. Thompson, 206 F. Supp. 539 (S.D. Miss. 1962), *aff'd*, 313 F.2d 637 (5th Cir.), *cert. denied*, 375 U.S. 951 (1963). The city subsequently integrated all its recreational facilities with the exception of its five swimming pools. These were closed in 1963 and have remained closed. Palmer v. Thompson, 391 F.2d 324, 325 (5th Cir. 1967).

senting.[2] On certiorari, the United States Supreme Court affirmed and HELD, the city's closing of all city operated pools to all citizens was not a denial of equal protection, since neither the fourteenth amendment nor Congress imposes an affirmative duty on the states to provide or maintain recreational facilities for the public.[3]

After *Plessy v. Ferguson*,[4] the doctrine of "separate but equal" sanctioned segregation of the races at public recreation facilities. However, the facilities provided for blacks were generally separate but not equal to those provided for whites.[5] After World War II the Supreme Court began to interpret the fourteenth amendment to require equality in state provided facilities,[6] particularly in the area of education where the Court recognized that separate could not be equal.[7] In the 1954 landmark opinion, *Brown v. Board of Education*,[8] the separate but equal doctrine was specifically overruled in the field of education because separate educational facilities were "inherently unequal."[9]

The *Brown* rationale was soon extended to areas other than education.[10] One week after its decision in *Brown* the Supreme Court vacated a judgment upholding segregation by the lessees of a city owned amphitheater and remanded the case "for consideration in the light of the *Segregation Cases*."[11] Negro citizens have subsequently initiated numerous suits[12] seeking integration of public golf courses, parks, auditoriums, swimming pools, and other facilities. A state action denying blacks access to and use of public recrea-

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2. Palmer v. Thompson, 391 F.2d 324 (5th Cir. 1967), *aff'd on rehearing*, 419 F.2d 1222 (5th Cir. 1969) (en banc).

3. 403 U.S. 217 (1971) (Douglas, White, Brennan, and Marshall, JJ., dissenting).

4. 163 U.S. 537 (1896).

5. *See* McKay, *Segregation and Publication Recreation*, 40 VA. L. REV. 697, 702-06 (1954).

6. *E.g.*, Beal v. Holcombe, 193 F.2d 384 (5th Cir. 1951), *cert. denied*, 347 U.S. 974 (1954) (golf course); Williams v. Kansas City, 104 F. Supp. 848 (W.D. Mo.), *aff'd*, 205 F.2d 47 (8th Cir. 1952), *cert. denied*, 346 U.S. 826 (1953) (swimming pool); Boyer v. Garrett, 88 F. Supp. 353 (D. Md. 1949), *aff'd*, 183 F.2d 582 (4th Cir. 1950), *cert. denied*, 340 U.S. 912 (1951) (athletic facilities at park); Rice v. Arnold, 45 So. 2d 195 (Fla.), *vacated*, 340 U.S. 848 (1950), *judgment of Fla. cir. ct. aff'd*, 54 So. 2d 114 (Fla. 1951), *cert. denied*, 342 U.S. 946 (1952) (golf course).

7. McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950).

8. 347 U.S. 483 (1954); *accord*, Brown v. Board of Educ., 349 U.S. 294 (1955).

9. Brown v. Board of Educ., 347 U.S. 483, 495 (1954). *Accord*, Bolling v. Sharp, 347 U.S. 497, 499 (1954), where the Supreme Court stated: "Classifications based solely upon race must be scrutinized with particular care . . . ."

10. Holmes v. City of Atlanta, 223 F.2d 93 (5th Cir.), *aff'd*, 350 U.S. 879 (1955) (municipal golf course); Dawson v. Mayor & City Council, 220 F.2d 386 (4th Cir.), *aff'd*, 350 U.S. 877 (1955) (public beaches). *See generally* McKay, *supra* note 5.

11. Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954), *vacating & remanding* 202 F.2d 275 (6th Cir. 1953).

12. *E.g.*, Johnson v. Virginia, 373 U.S. 61 (1963) (courtrooms); Eubanks v. Louisiana, 356 U.S. 584 (1958) (buses); Hanes v. Shuttlesworth, 310 F.2d 303 (5th Cir. 1962) (parks); City of St. Petersburg v. Alsup, 238 F.2d 830 (5th Cir. 1956), *cert. denied*, 353 U.S. 922 (1957) (swimming pool); Ward v. City of Miami, 151 F. Supp. 593 (S.D. Fla. 1957) (golf course); Fayson v. Beard, 134 F. Supp. 379 (E.D. Tex. 1955) (park).

tional facilities has been generally found to violate the fourteenth amendment.[13]

Where devious methods or delaying tactics have been employed by governmental bodies to avoid desegregation of public recreational facilities, the courts have not hesitated to take action. Sale[14] and lease[15] of public facilities to private individuals to avoid desegregation have been held to violate the fourteenth amendment. In *Watson v. City of Memphis*[16] the city pointed to the partial desegregation of its parks and other facilities and argued the need for moving slowly and gradually toward total desegregation. The Supreme Court held that any further denial of the use of city facilities by the Negro petitioners was without justification.[17] The *Brown* decision, according to the Court, never intended or contemplated that "deliberate speed" would mean lengthy delay in the elimination of racial discrimination in public recreation.[18]

Lower federal courts, however, have also indicated that there is no constitutional duty for a state to provide recreational facilities for its citizens no matter how desirable that may be, and that a bona fide sale or a complete cessation of operation of a facility will not violate the fourteenth amendment.[19] Consistent with this reasoning are several cases where the closing or sale of a facility in the face of a court order to desegregate has not been held to be a denial of equal protection or contempt of court.[20]

The instant case arose out of the closing of five swimming pools by the city of Jackson in the face of a district court declaratory judgment that the segregated operation of recreational facilities by a city was a denial of equal protection of the law.[21] The city desegregated its parks, zoo, golf course, and auditorium but decided to close the pools rather than operate them on an integrated basis.[22] The continued economic loss in operating the pools and the possibility of public disturbances resulting from integration were cited as justifications.[23] The petitioners, relying upon the equal protection clause

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13. *E.g.*, City of St. Petersburg v. Alsup, 238 F.2d 830 (5th Cir. 1956), *cert. denied*, 353 U.S. 922 (1957).

14. Hampton v. City of Jacksonville, 304 F.2d 320 (5th Cir.), *cert. denied*, 371 U.S. 911 (1962).

15. City of Greensboro v. Simkins, 246 F.2d 425 (4th Cir. 1967). *See also* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

16. 373 U.S. 526 (1963).

17. *Id.* at 539.

18. *Id.* at 530-32.

19. *E.g.*, Hampton v. City of Jacksonville, 304 F.2d 320, 322 (5th Cir. 1962); Willie v. Harris County, 202 F. Supp. 549, 552 (S.D. Tex. 1962).

20. *E.g.*, Hampton v. City of Jacksonville, 304 F.2d 320 (5th Cir. 1962) (pool); City of Montgomery v. Gilmore, 277 F.2d 364 (5th Cir. 1960) (parks); Tonkins v. City of Greensboro, 276 F.2d 890 (4th Cir. 1960) (pool).

21. Clark v. Thompson, 206 F. Supp. 539 (S.D. Miss. 1962), *aff'd*, 313 F.2d 637 (5th Cir.), *cert. denied*, 375 U.S. 951 (1963).

22. 403 U.S. at 219.

23. *Id.* Where there was ongoing racial discrimination these reasons have been dismissed as insufficient. Watson v. City of Memphis, 373 U.S. 526 (1963) (delay in desegregating public parks and other facilities); Cooper v. Aaron, 358 U.S. 1 (1958) (attempt to suspend

of the fourteenth amendment, argued that the city's reasons for closing the pools could not be sustained where the state action[24] was based upon a suspect classification.[25] The Court acknowledged the validity of this argument but stated that the basic issue was whether the citizens of Jackson were, in fact, being denied their constitutional rights.[26] The majority found they were not,[27] reasoning that the closing of the pools affected blacks and whites equally.[28]

The petitioners relied in part on *Griffin v. County School Board*[29] where all the public schools in Prince Edward County, Virginia, were closed and replaced by private schools for white students only. State and county funds were eventually used to finance the private schools and tax credits were given to those who donated to the schools. The Supreme Court held that this disguised attempt to perpetuate segregated schools through state action constituted a denial of equal protection of the law.[30] The instant case was distinguished from *Griffin* because no public funds were being used to operate segregated public or private pools.[31]

The majority also distinguished *Bush v. Orleans Parish School Board*,[32] in which the Court struck down state statutes expressly designed to continue segregation in the Louisiana public schools.[33] The Court noted that *Bush* involved public schools, an enterprise described in *Brown* as "perhaps the most important function of state and local government."[34] There was no indication in the instant case, however, that the criteria for desegregation of public recreation facilities should be different from those for schools.[35]

Another ground urged by the petitioners was the alleged motivation of the Jackson city council in closing the pools.[36] Despite the pools being closed in response to the district court judgment, the Supreme Court refused to consider motivation as the sole criterion in finding a denial of equal pro-

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school desegregation plan); Buchanan v. Warley, 245 U.S. 60 (1917) (municipal ordinance prohibiting whites or blacks from moving into any block where a greater number of houses were occupied by members of the opposite race).

24. The acts of the city council constituted state action. 403 U.S. at 220.

25. *Id.* at 224-26.

26. *Id.* at 226.

27. *Id.* at 225-26.

28. In the past, similar reasoning has been deemed spurious. *See* Loving v. Virginia, 388 U.S. 1 (1967) (criminal conviction in miscegenation case); Anderson v. Martin, 375 U.S. 399 (1964) (voting laws).

29. 377 U.S. 218 (1964).

30. *Id.* at 232.

31. 403 U.S. 217, 222.

32. 365 U.S. 569 (1961), *affirming* 187 F. Supp. 42 (E.D. La. 1960).

33. The statute involved in the instant case is very general. MISS. CODE ANN. §3374-112 (Supp. 1968) authorizes municipalities to "purchase and hold real estate . . . for all proper municipal purposes, including parks . . . to sell and convey any real . . . property owned by it . . . as may be deemed conducive to the best interest of the municipality . . . ."

34. Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

35. 403 U.S. at 221 n.6. *But see id.* at 229. The dissenters insisted that there was no difference.

36. 403 U.S. at 224.

tection. Motivation, it seems, is only relevant when there is a suspect classification or an apparent denial of equal protection.[37] The actual effect of the legislative enactment, not motivation, was the critical factor in the Court's determination of the constitutionality of the city's actions.[38] In addition, while the Court acknowledged that the council may have been motivated by racial considerations, the economic and public safety reasons advanced for closing the pools were deemed legitimate under the circumstances. The law on its face was not designed to prevent desegregation.[39]

This reasoning was emphatically denounced in the dissenting opinion of Justice White, who argued that the Court had avoided the issue of motivation.[40] Prior to the actual closing of the pools, the mayor of Jackson made public statements to the effect that he and the council were determined to keep the facilities segregated. Justice White pointed out that while the city's pools had been losing 11,700 dollars annually, the decision by the council to close the pools and desegregate the other facilities came only after the Supreme Court had affirmed the order to desegregate the public facilities.[41] Furthermore, the council's fear of racial violence at the pools in the event of desegregation was unsubstantiated. These disturbing facts left "little doubt that shutting down the pools was nothing more or less than a most effective expression of official policy that Negroes and whites must not be permitted to mingle together when using the services provided by the city."[42]

The opinions in the instant case reflect the full range of arguments that have been advanced in the segregation cases since *Brown*.[43] The instant case was strongly criticized when decided by the lower courts,[44] and on its face appears contrary to the trend in equal protection litigation. The Supreme Court looked to the end product of the city's action and found the record showed: (1) no collusion between the city and any private organization; (2) no encouragement of private discrimination; and (3) no unequal effect of the closing upon blacks as opposed to whites. The Court agreed that where

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37. *Id.* at 225. In Griffin v. County School Bd., 377 U.S. 218, 231 (1964), the Supreme Court said: "Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one . . . ." not based on race. In Evans v. Abney, 396 U.S. 435 (1970), the majority assumed *arguendo*, and the dissent took as established law, that while a park may be constitutionally closed for a legitimate reason, strong or weak, or for no reason at all, it cannot be closed solely to avoid the duty to desegregate.

38. *Id. But see* Abascal, *Municipal Services and Equal Protection: Variations on a Theme by* Griffin v. Illinois, 20 HASTINGS L.J. 1367, 1381 (1969).

39. 403 U.S. at 225.

40. 403 U.S. at 240-71.

41. *Id.* at 249-51.

42. *Id.* at 241.

43. The petitioners also alleged that the closing of the pools was a "badge or incident" of slavery condemned by the thirteenth amendment. U.S. CONST. amend. XIII. The argument was summarily rejected by the Court. 403 U.S. at 226-27.

44. Comment, *Closing Public Pools To Avoid Desegregation: Treading Water*, 58 GEO. L.J. 1220 (1970); Note, *Constitutional Law-Civil Rights—Closing Municipal Swimming Pools in Response to Desegregation Order Does Not Violate Negro Plaintiffs' Thirteenth or Fourteenth Amendment Rights*, 16 WAYNE L. REV. 1434 (1970).

constitutional rights were involved, fear of violence and a desire to save money would not justify an otherwise impermissible state action. The basic weakness of the instant decision appears to be the Court's refusal, because it found no patent constitutional violation, to examine the city's motive for closing its pools. This evidences a basic unwillingness of the majority to scrutinize each local termination of public service to ascertain whether some constitutional mandate has been violated.[45] More importantly, although federal courts treat public recreation in the same manner as "essential" public functions, such as education where there is ongoing discrimination,[46] they do not use the same criteria when an attempt is made to close down the facility altogether.

While recreation may be very desirable and beneficial to the health and welfare of the public, the Court did not deem it as inherently important as education. In light of the present case, a 5-4 decision based upon a "very meager record,"[47] it would be theoretically possible for a governmental body to close down all its recreational facilities in order to avoid desegregation. The Supreme Court has thus allowed a city to withdraw a traditional public function for the obvious purpose of preventing that public function from being operated without regard to race.[48] For this decision to be controlling in future segregation litigation, the legal issues and fact situation will hopefully be limited to the narrow grounds involved therein.[49]

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45. 403 U.S. at 228.

46. *See* text accompanying notes 10-18 *supra*.

47. 403 U.S. at 228.

48. In Evans v. Newton, 382 U.S. 296 (1966), the operation of a recreational facility was seen by the Court as a traditional public function. It has been held in other areas that even though a public service can be termed a benefit or a privilege, it may not be withdrawn without due process of law. Goldberg v. Kelly, 397 U.S. 254 (1970). It has also been held that a person may not be denied governmental benefits in violation of first amendment rights. Sherbert v. Vernor, 374 U.S. 398 (1963).

49. This case, however, along with Evans v. Abney, 396 U.S. 435 (1970) (park) and James v. Valtierra, 402 U.S. 137 (1971) (low income housing), indicates the Supreme Court may now be less willing to scrutinize every case where a violation of the fourteenth amendment is alleged but some plausible and legitimate end appears on the face of the situation.